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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	EB Docket No. 02-21
)	
Peninsula Communications, Inc.)	
)	
Licensee of stations)	File No. EB 01-IH-0609
KGTL, Homer, Alaska;	)	FRN: 0001-5712-15
KXBA(FM), Nikiski, Alaska;	)	Facility ID Nos. 52152
KWW-FM, Homer, Alaska; and	)	86717
KPEN-FM, Soldotna, Alaska.	)	52145
	)	52149
)	
Licensee of FM translator stations)	
K292ED, Kachemak City, Alaska;	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
)	
Appellant licensee of FM translator stations)	
K285EF, Kenai, Alaska;	)	52161
K283AB, Kenai/Soldotna, Alaska;	)	52155
K257DB, Anchor Point, Alaska,	)	52162
K265CK, Kachemak City, Alaska;	)	52154
K272CN, Homer, Alaska; and	)	52148
K274AB and K285AA, Kodiak, Alaska	)	52151 and 52164

To: Chief Administrative Law Judge
Richard L. Sippel

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF
PENINSULA COMMUNICATIONS, INC.

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Date: December 24, 2002

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SUMMARY

1. By ***Order to Show Cause***, FCC 02-32 (released February 6, 2002) (“OSC”), the Commission commenced a hearing to determine whether the above-captioned commercial broadcast licenses held by Peninsula Communications, Inc. (“PCI”) should be revoked based on an administration hearing solely on the following issues:

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.’s operation of former FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to

August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001), and related violation of Section 416(c) of the Act;

- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. **has** the requisite character qualifications to be a Commission licensee and **thus** whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked. (OSC at para. 6).

Pursuant to section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau was ordered to **serve as** trial staff in this proceeding, and pursuant to Section 312(d) of the Act, 47 U.S.C. § 312(d), and section 1.91(d) of the Commission's rules, 47 C.F.R. § 1.91(d), the burden of proceeding with the introduction of evidence and the burden of proof was placed upon the Commission. (OSC at paras. 8 and 9).

2. A prehearing conference was held on March 12, 2002. **The** administrative hearing was held on September 24th through September 27th. An admission session was held on October 16, 2002. **By Order** released on December 11, 2002, findings of fact and law **were** required to be filed **by** the parties with the Commission **by** noon on December 24, 2002. (FCC 02M-110).

3. Peninsula Communications, Inc. ("**PCI**") is owned by David and Eileen Becker, husband and wife. They both own 50% **of** the company. Decisions involving the broadcast operations **of** the stations **are** primarily made **by** Mr. Becker.

4. **PCI was** ordered by the FCC to terminate the operation **of** certain FM translator stations that it was licensed to operate in the State **of Alaska** under waivers **granted** pursuant to a policy first outlined in the case *Wrangell Radio Group*. **PCI** appealed this decision with the **United States** Court of Appeals **for the** District of Columbia and continued to operate the subject translators while its appeal is pending. It turned the translators **off** on **August 28**,

2002. Therefore the period of the alleged non-compliance with the FCC order is August **29,2001** to August **28,2002**.

5. PCI believed that it was authorized to continue to operate the translators under Sections 307,402, and 405 of the Communications Act of **1934**, as amended, and certain FCC legal precedent that allowed licensees of stations whose license renewal applications had been denied to continue to operate the stations while they pursued appeals before the **D. C. Circuit**. PCI also believed that it was authorized to continue to *operate* the stations as a result of a stay issued by the United States Court of Appeals for the Ninth Circuit, and by agreements with the United States Attorney **for** Alaska who was counsel to the FCC in an enforcement proceeding in the United States District Court for Alaska. PCI has been previously fined \$140,000 by the Commission for its continued operation of the translators

6. The Enforcement **Bureau** has failed to meet its burden of proof **in**:

- a. demonstrating that the termination order was effective during the period in question;
- b. demonstrating the termination order was a final order;
- c. proving the exact period during which PCI was out of compliance with the **order**.

Moreover, assuming *arguendo* that PCI was guilty of non-compliance with the termination order, its past conduct as a FCC licensee and other factors do not **lead** to the conclusion that the ultimate sanction, revocation of all of its broadcast licenses, is appropriate. Rather, the sanctions that have been issued against PCI, revocation of the translator licenses, termination of the operation of the translators, and the \$140,000 forfeiture, **are** sufficient punishment for any transgressions in *the matter* over the period in question.

GLOSSARY

Bureau	Enforcement Bureau
Coastal	Coastal Broadcast Communications, Inc.
D. C. Circuit	United States Court of Appeals for the District of Columbia
EB	Enforcement Bureau (exhibits)
FCC	Federal Communications Commission
<u>MO&O-I</u>	<i>Peninsula Communications, Inc.</i> , 13 FCC Rcd 23992 (1998)
<u>MO&O II</u>	<i>Peninsula Communications, Inc.</i> , 15 FCC Rcd 3293 (2000)
Ninth Circuit	United States Court of Appeals for the Ninth Circuit
ON	Official Notice (exhibits)
OSC	<i>Order to Show Cause</i> , FCC 02-32 (released February 6, 2002)
PCI	Peninsula Communications, Inc. (and exhibits)
<i>Policy</i>	<i>Policy Regarding Character Qualifications in Broadcast Licensing</i> , 102 FCC 2d 1179 (1986), <i>modified in part</i> 1 FCC Rcd 421 (1986)
<u>Termination Order</u>	<i>Peninsula Communications, Inc.</i> , 16 FCC Rcd 11364 (2001)
TR	Transcript Record
<i>Wrangell</i> FM translator stations	FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak
<i>Wrangell Radio Group, Inc</i>	75 FCC 2d 404, 46 RR 2d 1329 (1979)
<i>1990 FCC Report And Order</i>	5 FCC Rcd 7212 (1990)

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16FCC Rcd 11364(2001), and related violation of Section 416(c) of ~~the~~ Act;'
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II. FINDINGS OF FACT

A. Background.

3. Eileen Becker and David Becker, who ~~are~~ husband and wife, formed Peninsula Communications Inc. in August of 1978. (PCI 1 at 2). They each own 50% of the company. (TR 93). PCI began in the radio **business** with KGTL-FM, Homer, Alaska, signing on the air in September of 1979 as the first local FM radio station in Homer, Alaska, and was a pioneer

¹ These shall be referred to ~~as~~ the *Wrangle* NFM translators.

broadcaster in the State of Alaska. (PCI 1 at pages 5-6) Over the past 23 years of broadcast operation, PCI has maintained a clean record of operation in connection with its ownership and operation of all ~~of~~ PCI's above-captioned FCC licensed stations. PCI has never been fined; except for a \$140,000 forfeiture issued by the FCC in 2002 in connection with the operation of its *Wrangell* FM translator stations after May of 2001. (PCI 1 at page 11)

4. David Becker, the President of PCI, is in charge of the technical operations of the PCI stations, oversees the sales operation (TR 94), and generally holds the overall decision-making authority at PCI, following consultation with his wife on major matters. (TR 115-116). Mr. Becker holds a Bachelor of Science Degree in Electronic Engineering from California State Polytechnic University, San Luis Obispo, California, and graduated **Cum Laude** in 1967. He was the top student in his class graduating with a 3.7 grade point average in his major. Mr. Becker earned a Master of Science Degree in Electrical Engineering from the University of California, Santa Barbara, California, in 1970. He was employed for six years by Raytheon Company, Electromagnetic Systems Division, Santa Barbara until 1976 when the Beckers moved to Alaska. Mr. Becker held a "Top Secret" security clearance while at Raytheon and developed Electronic Counter Measure Systems that were successfully used in the Viet Nam War for the benefit of the United States military. (PCI 1 at pages 3 & 4).

5. Mr. and Mrs. Becker profess a faith in the Lord Jesus Christ and are practicing Christians. They have been active in their church for nearly 30 years. Mr. Becker has served on the Board of Directors for Alaska Village Missions, which operates the Alaska Bible Institute, for the past 26 years. He has never been involved in any form of crime, drugs or immoral activities, and stands firmly against any such illegal or immoral activity. His reputation for such personal convictions has been well known in his community for the past 30 years. He has

personally hosted a three-hour Christian music program on **Sunday** morning called “Songs of Praise” on the radio for the past 23 years. He professes to not believe in flaunting authority or breaking the law since he believe as a matter of faith that Christians should set an example of moral and ethical conduct. (PCI 1 at pages 3-4).

B. PCI’s *Wrangell* FM Translator Stations.

6. After PCI’s KGTL FM signed on the air in September of 1979 as the first local FM radio station in Homer, Alaska, PCI added another full service FM station, KPEN-FM, licensed to Soldotna, Alaska, in 1984.² (PCI 1 at 5). Thereafter, under the Commission policy of liberally granting “*Wrangell Radio Group*” waivers for the operation of FM translator stations operating in the State of Alaska, PCI sought FCC authority, and received FCC permission, to operate the following *Wrangell* FM translator stations in a manner that was at variance with the Commission’s rules and regulations governing the operation of FM translator stations³:

<u>Call Sign</u>	<u>Community</u>	<u>File Number</u>	<u>Permit Grant Date</u>	
K285EF	Kenai	BPFT-19910513TF	09/06/1991	EB 7
K283AB	Kenai & Soldotna	BPFT-19820414IA	04/13/1984	PCI 6; EB 6
K257DB	Anchor Point	BPFT-19860409TR	06/26/1986	PCI 7; EB 8
K265CK	Kachemak City	BPFT-19860409TT	06/26/1986	EB 5
K272CN	Homer	BPFT-19860409TP	06/26/1986	PCI 4; EB 3
K274AB	Kodiak	BPFT-19840410MH	09/13/1984	PCI 5; EB 4
K285AA	Kodiak	BALFT-19880525TA	07/31/1988	PCI 8; EB 9

PCI operated these translators continuously for as long as 19 years in serving the public in the communities in which they were licensed before ceasing operation on August 28, 2002. (TR 147, 148, 149, 151, 152) These are the *Wrangell* FM translator stations whose continued operation by

² PCI also acquired licenses for full power stations KXBA(FM), Nikiski and KGTL(AM), Homer, Alaska.

³ The Commission’s staff recognized that PCI had been “...granted waivers under our Alaska policy exception...” for the operation of these translators in its March 4, 1996 letter to PCI concerning the 1995 license renewal applications. (ON 7 at page 2, footnote 3) The Commission was later to suggest that its staff had not granted *Wrangell* waivers for all of these

PCI after August 29 of 2001 are the basis for the institution of this OSC proceeding. There are no allegations by the Commission of any wrong-doing on the part of PCI in connection with the operation of its other full power AM, FM, and FM translator stations captioned above, all of which continue to operate!

C. *Wrangell Radio Group* Policy Waivers for FM Translators Operating in Alaska.

7. It was the mindset and policy of the Commission to encourage the proliferation of broadcast signals in Alaska during the decade of the 1980's through a policy that was known as the "Alaska Exception" to the FM translator rules. (PCI 1 at page 6, PCI 6 at page 60). This policy of waving the normal requirements and/or limitations placed on FM translators operating in Alaska was based on a 1979 decision by the Commission, *Wrangell Radio Group, Inc.*, 75 FCC 2d 404, 46 RR 2d 1329 (1979). The *Wrangell* policy regarding waivers of the normal rules for FM translators operating in the State of Alaska ~~was~~ applied **by** the Commission's staff to many of the limitations in the FM translator rules, including ownership restrictions, signal delivery, power output, program origination, and allowing the cross band transmission of AM stations on FM translators. (TR 161,390). The staff granted PCI "blanket" **rule** waivers under *Wrangell*, and liberally granted these blanket waivers without the need for PCI to specifically cite rule sections outside of the information provided in the applications and in the covering letters from counsel to PCI. (TR 165) In 1984, PCI's FM translator application for Kenai/Soldotna, FCC File BPFT-19840419ME, was approved, with the Commission's staff

stations. See also, PCI 1 at C-9.

⁴ KGTL(AM), Homer, Alaska;
KXBA(FM), Nikiski, Alaska;
KWW-FM, Homer, Alaska; and
KPEN-FM, Soldotna, Alaska.
K292ED, Kachemak City, Alaska;
K285DU, Homer, Alaska;

waiving the normal output power and signal retransmission limitations for the proposed station under the following justification:

The Commission has on a number of occasions recognized the unique nature of the communications industry in the Alaska and the distinct lack of adequate communications service to the state. In *Wrangell Radio Group, Inc.*, 75 FCC 2d 404, 46 RR 2d 1329 (1979), the Commission granted applications proposing satellite-fed TV translators in seven Alaska communities. Its decision was based on the need for additional over-the-air broadcast signals to serve small, isolated communities in the state. As the Commission noted:

The State of Alaska contains numerous small, isolate, and remote villages. Many of these remote native villages are more than 500 miles apart. As a result, television broadcast signals are not readily available off-the-air in most Alaskan communities. Additionally, the tremendous cost and impracticality (in some cases impossibility) of utilizing microwave to link those communities without off-the-air broadcast programming as we know it in the lower 48 states.

After careful consideration **of** this matter, I am of the view that in light of the Commission's special concerns for the availability of broadcast programming in Alaska, the public interest showing supporting your waiver requests justifies a grant **of** this application. (PCI 6 at 60 -61.)

Thereafter, for the next 11 years the FCC's staff routinely approved PCI applications, and allowed PCI's *Wrangell* FM translator stations to operate, with Alaska Exception waivers of various kinds. **On** February 18, 1992, the Commission's staff granted *Wrangell* waivers to allow PCI to build and operate its two FM translators in Seward, Alaska, with facilities at variance with the power limitations and signal carriage/ownership restrictions of the FM translator rules, using almost identical language to that in the 1984 Kenai-Soldotna letter referenced above. (EB 4 at 33-34.) And most recently, in December of 1998, the Commission approved the Special Temporary Authority operation of two of the seven *Wrangell* FM translator stations, K272AB and K285AA, Kodiak, Alaska, to allow the stations to recommence service pursuant to *Wrangell* waivers that had been applied for in 1997. (PCI 5 at pages 6-14 and PCI 8 pages 1-10). In each

K285EG and K272DG, Seward, Alaska.

case in which PCI has sought a **Wrangell** waiver to allow it to operate its FM translators in Alaska contrary to the restrictions in the Commission's FM translator **rules**, the waivers were approved by the FCC in issuing the licenses for the **Wrangell** FM translator stations. (PCI 1 at page 6).

8. PCI was not alone in receiving these **Wrangell** waivers for its FM translator stations, and many other FM translator licensees were authorized with, and continue to operate at this time under, **Wrangell** waivers. (EB 14 at 6-9 and TR 381-386). In some cases, these **Wrangell** waivers **are** broader and more encompassing than those granted to PCI for its translators. (TR 383). PCI is unable to explain the reason it has been ordered by the FCC **to** cease broadcasting on the **Wrangell** FM translator stations pursuant to the licenses it was issued under **Wrangell** waivers, while the FCC allows these other non-conforming FM translators in Alaska to continue to operate under their **WrangleN** waivers. (TR at 380-384).

D. The 1995 and 1997 PCI License Renewal Applications.

9. In 1995, PCI routinely filed applications with the FCC seeking to renew the licenses for all of its FM translator stations, including the **Wrangell** FM translator stations. In Exhibit No. 1 to each of the **Wrangell** FM translator station license renewal applications, PCI submitted the following disclosure:

In approving the original construction permit and license for this translator, the Commission granted a request by PCI Communications, Inc. for a waiver of Sections 74.1232(d) and (e) of the **rules**. PCI is the licensee of KPEN(FM), Soldotna, Alaska. KPEN is the station that is rebroadcast on the subject translator. The translator operates outside the protected contour of KPEN. However, PCI is authorized by the Commission's waiver of Sections 74.1232(d) and (e) to operate the translator in its present mode. (TR 310-313)

PCI was specifically informing the Commission that it was operating under its **Wrangell** waivers and intended to continue to do so. (TR 393-394) Each **of the** license renewal applications for

the *Wrangell* FM translator stations were the subject of petitions by several radio broadcasters in Alaska seeking the denial thereof and the termination of the licenses for the translators.⁵ The petitioners included Mr. John Davis' KSRM, Inc. and Mr. Andrew Tierney's Cobb Communications, Inc., the precursor of Mr. Dennis Bookev's Kodiak Broadcasting Company, Inc (hereafter jointly referred to as the "Alaska Broadcasters")⁶ (ON 11 at 1; TR 496-497; EB 33 at 1; EB 32 at 1; EB 31 at 1). The Alaska Broadcasters argued that a *1990 FCC Report And Order*, 5 FCC Rcd 7212 (1990), had modified the FM translator rules to such an extent that the *Wrangell* FM translator stations' rule waivers were no longer valid, and the *1990 Report And Order* required PCI to bring the operation of its translators into conformity with the new rules by the end of 1994. The Alaska Broadcasters sought the denial of the PCI license renewal applications and the termination of the operation of the translators. Such terminations of operation by the *Wrangell* FM translator stations would have effectively ended any competition that the Alaska Broadcasters faced in their respective markets. (TR 484,561, 572)

10. PCI maintained that its waivers remained valid under its operating licenses and the express language in the *1990 Report and Order*. (TR 119, 123, 129, 153-154) Specifically, PCI noted that while the *1990 Report and Order* had made wholesale changes in the restrictions on the operation of FM translators, footnote 59 to the *Order* provided, in pertinent part, that:

We intend that our decisions herein not alter in any fashion the special treatment we accord Alaska. Wrangell Radio Group, 75 FCC 2d 404 (1980). Upon an appropriate showing the Commission has accommodated Alaska's unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating (emphasis added). (ON 4 at page 34)

⁵ The series of events involving the 1995 and 1997 license renewal applications is outlined in detail in ON exhibits 11, 12, 13 and 14.

⁶ All were Enforcement Bureau witnesses along with KSRM, Inc. employee Cherie Brewer. Thus, the witnesses called by the Bureau lack credibility as individuals associated with companies that have been attempting to put the PCI FM translators off the air since 1995.

PCI maintained that it had never been notified by the Commission of any modification in the licenses for the *Wrangell* FM translator stations by the Commission, that its continued operation of the *Wrangell* FM translator stations was appropriate in light of the decision to “not alter in any fashion” the manner in which they operated, and that its license renewal applications should be approved for the full 8 year term provided for in the Commission’s Rules. (ON 12). Moreover, following the release of the *1990 Report and Order*, and until 1996, PCI was never notified by the Commission that its translators were operating in an unauthorized manner, in spite of the fact that PCI’s operations were subject to inspection by the FCC’s Enforcement Bureau during this period. (TR 373).

11. In a 1996 letter, the FCC’s staff, under delegated authority, granted the Alaska Broadcasters’ petitions in part, deferred the processing of the 1995 PCI FM translator license renewal applications, and ordered PCI to divest the licenses and to file applications to assign the licenses to one or more unaffiliated parties. (ON 11 at pages 1-5) It **took** this action without issuing an order to show cause or allowing PCI an opportunity to defend its licenses. The 1996 letter expressly represented that in the event the assignment applications for the *Wrangle* FM translator stations were approved, the license renewal applications would **also** be approved conditioned only upon the consummation of the assignments. PCI attempted to comply with the FCC’s mandate and filed applications in 1996 to assign the licenses to an unaffiliated entity, Coastal Broadcast Communications, Inc (“Coastal”). (ON 9 and 10) The Alaska Broadcasters filed petitions in opposition to the proposed, and FCC required, sale of the FM translators to Coastal.

12. In a subsequent letter in 1997, the FCC’s staff, under delegated authority, approved the assignment applications for the sale of the *Wrangell* FM translator stations to Coastal, and

approved the 1995 *Wrungell* FM translator stations renewal applications, but conditioned the latter approvals upon the consummation of the sale and upon a new condition: the grant of *Wrungell* FM translator stations license renewal applications that PCI had routinely filed earlier in 1997 in accordance with the FCC's rules? Various petitions by the Alaska Broadcasters seeking review of the 1997 letter were filed with the Commission. (ON 11)

13. The Commission thereupon reviewed the two staff letters and the record in the proceeding. In *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) (hereafter the "MO&O-I"), the FCC found there was no evidence that PCI had attempted to deceive or mislead the Commission in its operation of the *Wrangell* FM translator stations, that PCI's belief that its Alaska Exception waivers entitled it to continue to operate the stations beyond 1994 ~~was~~ "reasonable," and that there was no "substantial and material question of fact raised in the subject renewal proceeding regarding PCI's basic character" to hold licenses for the translators. (ON 11 at pages 4-6) Nevertheless, the FCC approved the 1997 license renewal applications for these FM translators conditionally, and affirmed the earlier actions by the its staff requiring the divestiture of the licenses, conditionally approving the assignment applications to Coastal, and conditionally approving the 1995 license renewal applications. The Commission also added a new condition by notifying PCI and Coastal that it was modifying the licenses for two of the translators operating in Seward, Alaska, by reserving the right for the future "...termination **of** the [two] Seward translator operations..." (ON 11 at pages 7-8) The FCC made this modification in the licenses for the two translators without issuing a show cause order and giving PCI **an** opportunity to respond to this condition. This action compromised PCI's ability to sell the translators to Coastal since the Commission was essentially telling the parties to expect the

⁷ PCI objected to this new and additional condition and sought reconsideration of it. (TR 211-

termination of the Seward licenses in the future.

14. In January of 1999, PCI and the Alaska Broadcasters submitted separate requests to the Commission for reconsideration of the MO&O-I. PCI sought reconsideration of the conditional approvals of the 1995 and 1997 license renewal and assignment applications, and the proposed modification in the licenses for the two Seward FM translators. PCI also sought reconsideration of the conditional nature of the Commission's license renewal approvals for the 1995 and 1997 applications for its FM translators based on the FCC's specific finding in the MO&O-I that PCI's actions in operating the *Wrangell* FM translator stations after 1994 was "reasonable", did not reflect adversely on its character and integrity as a licensee, and therefore the Commission lacked the statutory authority under the Section 309 Communications Act of 1934, as amended in 1996, to approve broadcast license renewal applications on a conditional basis in light of such a finding. At the same time, PCI filed a request for a stay of the MO&M-I pending Commission action on the petitions for reconsideration. (ON 12)

15. In the MO&O II⁸, released on February 14, 2000, over a year after PCI filed its request for reconsideration and a stay, the Commission summarily dismissed the PCI petition for reconsideration on a procedural basis without discussing the merits thereof. The licenses for the two Seward FM translators were further modified, without the issuance of a show cause order and without giving PCI an opportunity to respond to the modification, by ordering the termination of their operation under the Alaska Exception waivers within 60 days from the release date of the MO&O-II. The MO&O-II also summarily dismissed PCI's request for a Commission stay. The FCC's staff was ordered to rescind the 1995 and 1997 license renewal grants for the *Wrangell* FM translator stations, to cancel their call signs, and to terminate their

operating authority in the event the assignment of the licenses to Coastal was not consummated within 30 days of the release date.

16. However, that condition became impossible when Coastal, after waiting almost four years for FCC approval to purchase the PCI FM *translators*, notified PCI that it was no longer willing to move forward with the purchase of the stations. (TR 218-219; EB 19 at pages **4-5**) In a letter dated March 1, 2000, and filed with the Commission on March 3, 2000, Coastal notified PCI that due to the untenable, “3 1/2 year” delay in FCC approval for its purchase of the translators, and the unacceptable conditions contained in the Commission’s approval with “...the same resultant effect as saying ‘no’”, it was terminating its agreement with PCI and walking away from the transaction. (EB 19) Essentially, the FCC’s delay and associated conditions were “deal breakers”, rendering four (4) of the *Wrangell* FM translator station licenses useless to Coastal and preventing the sale from being consummated. (TR 215, 217-219) Thus, PCI was unable to meet the condition of consummating the Coastal sale within 30 days of the release of the MO&O II through no fault of its own.

17. On March 6, 2000, PCI sought to have the Commission’s actions in the MO&O-II and MO&O-I, reviewed by the United States Court of Appeals for the District of Columbia Circuit (hereafter the “D.C. Circuit”), on appeal. On March 15, 2000, PCI also submitted a “Rejection of Conditional License Renewal and Assignment of License Grants” (hereafter the “Rejection”) to the FCC, whereby it requested a statutorily required hearing on the basis of the conditional 1995 and 1997 license renewal grants by the Commission. This Rejection was timely **filed** pursuant to 47 C.F.R. 1.110, and within 30 days of the issuance of the MO&O-II. (TR 238)

18. On July 11, 2000, and upon consideration of the D. C. Circuit's Order to show cause issued on May 19, 2000, the Court dismissed the PCI appeal "...without prejudice to refiling following the Federal Communications Commission's resolution of Appellant's 'Rejection of Conditional License Renewal and Assignment of License Grants'". **The** dismissal was the result of a finding by the D.C. Circuit that the Commission's MO&O II was not a final order, and subject to review, since matters connected with the FM translators remained pending before the FCC, i.e. the Rejection by PCI. (PCI I-c at page 47)

19. Thereafter, Peninsula's applications for renewal of the broadcast licenses for its translators were denied, the Commission dismissed the Rejection by PCI without holding the statutorily required hearing, the licenses for the *Wrangell* FM translator stations were revoked, and the *Wrungell* FM translator stations were ordered to cease operation "...effective at 12:00 midnight on the day after the release of this Order." *Peninsula Communications Inc.*, 16 FCC Red 11364(2001), released on May 18, 2001 (the "Termination Order"). (ON 13). The Commission construed this termination requirement to require PCI to "...cease operations by 12:00 midnight on May 19, 2001." (ON 14 at page 4). PCI was not served with the Termination Order until May 30th, 2001. (ON 14 at page 4), or eleven (11) days after the Commission expected it to comply with the May 19, 2001 termination deadline.

20. After the release of the Termination Order, PCI's counsel notified the Commission that PCI intended to continue to operate the *Wrungell* FM translator stations while PCI pursued an appeal before the Court, and in conformity with Commission precedent allowing stations to continue to operate while appeals of the denial of license renewal applications were pending before the Court? (TR 224,227; ON 14 at page 4). PCI filed an appeal with the Court ~~in~~ a

⁹ The Commission recognizes in the OCS that this is its traditional policy. (OSC at page 3,

timely manner on June 15, 2001, or within thirty (30) days of the release of the Termination Order, and in conformity with the requirements of 47 U.S.C. 402(c).¹⁰ (TR 235) Due to the submission of its appeal before the FCC's Termination Order became "final", PCI continued to operate the **Wrungell**FM translator stations in conformity with the licenses that had been issued by the Commission. The D.C. Circuit ordered PCI and the Commission to address in their briefs whether the Commission's action in issuing the show cause order as part of the Termination Order effected the Court's jurisdiction over the appeal by rendering the Termination Order non-final. (PCI I-C at page 47) Thus, the D.C. Circuit is reviewing the issue of whether the Termination Order has become final, and thereby enforceable by the Commission.

21. In August of 2001, the Commission issued a *Notice of Apparent Liability For Forfeiture And Order*, FCC 01-242 (August 29, 2001) and assessed a \$140,000.00 forfeiture against PCI for its continuing to operate the PCI **Wrungell**FM translator stations. (ON 14). It also ordered PCI to file an affidavit by an officer or director indicating whether it intended to continue to operate the **Wrungell**FM translator stations "...absent further Commission or court action giving it authority to do so." (ON 14 at page 5, para. 15) PCI's President, **Mr. David Becker**, in an affidavit filed on September 10, 2001, affirmed that PCI believed it was entitled to continue to operate its **Wrungell**FM translator stations under the licenses granted by the Commission while its appeal was pending before the Court. (EB 1 at 30-35). In **his** declaration, **Mr. Becker** related in detail and full candor to the Commission PCI's basis for continuing to operate the **Wrungell**FM translator stations:

footnote 10). However, without substantive explanation it refused to apply this longstanding policy to PCI and its **Wrangell** FM translator stations. *See*, OSC at pages 3-4. The arbitrary nature of this action is a point on appeal before the D.C. Circuit.

¹⁰ The briefing schedule for the PCI appeal has been completed, and the matter is set for oral argument before the D. C. Circuit on January 14, 2003. (TR 159)

Section 1.62 of the Commission's Rules and Regulations, 47 C.F.R. 1.62, provides the procedures for the "Operation Pending Action on Renewal Applications" for broadcast stations. That **rule** provides as follows:

(a)(1) Where there is pending before the Commission at **the** time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing **nature**, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination which respect to the renewal application.. .

Section 73.3523(d)(2) of the Commission's Rules and Regulations, 47 C.F.R. 73.3523(d)(2), defines when a license renewal application is "pending" in the context of license renewal. That section provides:

(d)(2) **An** application shall be deemed to be pending before the Commission from the time an application is filed with the Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

Thus, under the Commission's broadcast license renewal rules and policy, a licensee is allowed to continue to operate its broadcast station within the context of a license renewal proceeding **so** long as the license renewal application remains subject to "...reconsideration by the Commission or to review by any court". This policy is effective no matter how heinous or otherwise outrageous the underlying conduct of the licensee may have been to warrant the denial of a license renewal application and/or the revocation of the license. *C.f. Contemporary Media, Inc. et.al. v. Federal Communications Commission*, 215 F.3d 187 (D.C. Cir. 2000) [licenses revoked due to licensee's sole owner and president being criminally convicted of sexually abusing children; licensee allowed to continue to operate stations through federal court appeal process].

While the Commission's Notice contains a fairly exhaustive recitation of the history of the regulatory proceeding involving the Translators, it unaccountably omits one quite important fact. The most recent orders in the Peninsula Translator proceeding, and those preceding them, are presently on review before the United States Court of Appeals for the District of Columbia Circuit. *See, Peninsula Communications, Inc. v. Federal Communications Commission*, Case No. 01-1273. The Commission is apparently aware of the pending nature of this action to review its orders in this proceeding since it has entered an appearance and is participating in the case. **See Attachment A.** Thus, Peninsula is at a loss to explain either the reason the Notice fails to mention the pending court proceeding, or to explain the erroneous conclusion in the Notice that it is operating the Translators that are the subject of court review "illegally."

In addition to the pending nature of the court appeal, the Translator proceeding may not be "final" at the present time in **the** context of the Commission's processes. On

September 6, 2001, the United States Court of Appeals issued an **Order** in the **Peninsula** case, noting that the Commission's most recent decision, **Peninsula Communications, Inc.** FCC 01-159 (released May 18, 2001), required Peninsula to show cause why two of its translator licenses should not be modified. The Court raises the question whether this action by the Commission renders the entire action in the Peninsula proceeding non-final until such time as the show cause matter is finally resolved. Peninsula and the Commission have been directed to file pleadings on the matter in October.

These aspects of the Peninsula proceeding underscore the policy basis for allowing license renewal applicants to continue the operation of broadcast stations until such time as any proceedings on the matter **are** final and no longer subject to review. Moreover, as noted in the above-referenced rule regarding continued operation of stations during the processing of license renewal applications, the Administrative Procedure Act requires that all regulatory procedures be fully implemented and exhausted before an authorization is finally revoked and operating authority is terminated. This is crucially important in the context of broadcast licenses since the implementation of the 1996 amendments to the Communications Act of 1934, as amended.

Newly enacted Section 312(g) of the Communications Act, 47 U.S.C. 312(g) provides:

(g) Limitation on silent station authorizations. If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of **that** broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

In the case at hand, should Peninsula immediately cease operation of its Translators, and should the United States Court of Appeals thereupon vacate the Commission's orders in this proceeding more than 12 months thereafter, the licenses for the Translators would have ceased to exist, Peninsula would no longer have broadcast licenses for its Translators for the Commission to reinstate and upon which to grant the subject license renewal applications. Peninsula will not, and cannot, allow such a scenario to come to pass since it believes that it will ultimately prevail in its appeal.

It is undisputed that Peninsula has not been given "...notice and opportunity for a hearing..." in accordance with Section 309(e) of the Communications Act prior to the denial of the license renewal applications for its Translators. It is also undisputed that Peninsula has never been issued an order to show cause why its Translator licenses should be modified or revoked in conformity with the requirements of Section 312(c) of the Communications Act. Therefore, because the Commission's various **orders** in this proceeding denying the license renewal applications and revoking the Translator licenses conflict with the clear statutory language of **the** Communications Act, Peninsula is confident the **Court** will ultimately vacate **the orders** and **require** the Commission to accord Peninsula **the** administrative due process to which it is entitled. *C.f. National*

Public Radio, Inc. V. Federal Communications Commission, July 3, 2001, No. 00-1246 [application of auction procedures to noncommercial broadcast applications in conflict with Communications Act section 309(j)(2) requiring action to be vacated without the need for consideration of other arguments by appellants]. At that point, it is incumbent on Peninsula to ensure that the licenses for its Translators remain viable and in full force and effect. Peninsula intends to protect and defend the viability of its Translator licenses to the fullest extent of its ability.

The Commission's Notice attempts to characterize Peninsula as a licensee who would intentionally and blatantly violate the Commission's rules and policies, and ignore a legitimate Commission order or mandate. This is unsupported by the record in this proceeding and Peninsula's record as a Commission broadcast licensee since 1979. Peninsula is a family-owned broadcasting company consisting of my wife, Eileen Becker, and myself. We have operated AM, FM and FM translator stations licensed by the Commission since we were first issued a license for KGTL-FM, Homer Alaska (now K W - F M) in 1979. Over the course of the last 22 years, and up until the issuance of the Notice, Peninsula has never been cited by the Commission for any knowing violation of its rules and/or policies in connection with the operation of its broadcast stations. It has acted as a responsible and conscientious broadcast licensee of the Commission and will continue to do so. However, Peninsula will not sacrifice its statutory rights to continue to operate its duly licensed Translators under the duress and threat of an unwarranted and wholly inappropriate fine of \$140,000.00. I would ask the Commission to reconsider this action within the context of this Declaration and the facts contained herein, subject to my right to supplement those facts and this request for reconsideration. (EB 27 at pages 2-7)

E. Ninth Circuit Proceeding Against PCI.

22. In July of 2001, the United States Attorney for Alaska, at the request of the FCC¹¹, filed an action in the United States District Court for the District of Alaska seeking an injunction against PCI and requiring that the *Wrangell* FM translator stations cease operation. The District Court initially granted a motion for a preliminary injunction, but PCI filed an appeal with the United States Court of Appeals for the Ninth Circuit (hereafter the "Ninth Circuit"). (TR 104-105,269) During the period between the District Court ruling and the filing of the Ninth Circuit appeal, it was agreed between PCI's counsel and the United States Attorney for Alaska, representing the interests of the FCC, that the *status quo* could be maintained and the *Wrangell*

¹¹ 47 U.S.C. 401(c) provides that such shall be brought only at the request of the FCC.

FM translator stations could remain in operation. (TR 269-270) On November 21, 2001, the Court of Appeals for the Ninth Circuit entered a stay of the injunction, allowing PCI to continue to operate the Wrangell FM translator stations. (TR 104-105) This injunction remained in effect until April 22, 2002 when the Ninth Circuit vacated the stay, but PCI timely-filed a request for rehearing. (PCI 1-C at pages 23-24). PCI argued that it should be allowed to continue to operate the Wrangell FM translator stations until the completion of all appellate proceedings, including its appeal before the D.C. Circuit. (PCI 1-C at 25-27)

23. The Ninth Circuit denied PCI's request for rehearing on July 3, 2002. (ON 19) Moreover, in its underlying order, the Ninth Circuit held that under the procedural scheme set up under the Communications Act of 1934, only the D.C. Circuit was empowered to stay enforcement of the FCC order, and directed that PCI would need to seek relief before that venue. (ON 17 at page 10, TR 228, 370) The Ninth Circuit did not address the legality of the Termination Order or render an opinion on the **bona fides** of any of the points of the PCI appeal before the D.C. Circuit. (TR 229-230, 256) PCI filed its request for stay before the D.C. Circuit in July of 2002, but the request was denied by an order released on August 13, 2002. (ON 20). Thereupon, having exhausted its appeal court remedies, PCI terminated the operation of the *Wrangell* FM translator stations on August 28, 2002. (TR 228, 346) This was deemed an appropriate date for PCI to terminate the operation of the *Wrangell* FM translators following discussions between, and after the mutual agreement of, PCI and the United States Attorney in Alaska. (TR 125, 269-270) The Wrangell FM translator stations have remained off the air since that time. (TR 142) PCI's President, Mr. David Becker, testified that PCI would have terminated the operation of the Wrangell FM translator stations had the Ninth Circuit not issued a stay of the Alaska District Court's injunction, but continued their operation after the Ninth

Circuit issued the stay under the authority of the stay order. (TR 271,298)

F. PCI'S State of Mind in Continuing its Operation of the *Wrangell* FM translator stations.

24. PCI's reasons for continuing to operate the *Wrangell* FM translator stations after August 29,2001, and while its various Federal court appeals were being prosecuted has been repeatedly given to the Commission since the release of the Termination Order. Immediately after the release of the Termination Order, PCI's counsel notified the Commission that **PCI** intended to continue to operate the *Wrangell* FM translator stations while PCI pursued an appeal before the D.C. Circuit, and in conformity with Commission precedent allowing stations to continue to operate while appeals of the denial of license renewal applications were pending before the Court.¹² (TR 224,227; ON 14 at page 4). In August of 2001, the Commission issued a *Notice of Apparent Liability For Forfeiture And Order*, FCC 01-242 (August 29,2001). (ON 14) **PCI's** President, Mr. David Becker, in an affidavit filed on September 10,2001, affirmed that PCI believed it was entitled to continue to operate its *Wrangell* FM translator stations under the licenses granted by the Commission while its appeal was pending before the Court. (EB 1 at **30-35**). After being given the opportunity to do so by the Presiding Judge, PCI filed its "Motion For Leave To Offer Proof" on June 19,2002 and further provided the record with its reasons for continuing the operation of the *Wrangell* FM translator stations. (This is included as PCI 1-C-1 through 11) Finally, the hearing record contains further testimony on the continuing operation of the *Wrangell* FM translator stations while PCI pursued its judicial remedies. Mr. Becker relates PCI's basis as follows starting at PCI 1-C-2:

¹² The Commission recognizes in **the OCS** that this is its traditional policy. (OSC at page 3, footnote 10). However, without substantive explanation it refused to apply this longstanding policy to PCI and its *Wrangell* FM translator stations. *See*, OSC at pages 3-4. **This** is a point on appeal before the D.C. Circuit.